

**UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION**

Midwest Independent Transmission)	Docket No. RT01-87-000
System Operator)	RT01-87-001
)	ER02-106-000
)	ER02-108-000

**REQUEST FOR REHEARING AND CLARIFICATION
OF THE
ILLINOIS COMMERCE COMMISSION**

Pursuant to Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.713, the Illinois Commerce Commission ("ICC") hereby respectfully submits its Request for Rehearing and Clarification of the Commission's Order issued December 20, 2001, in the above-captioned proceeding.¹

I. BACKGROUND

¹ On December 20, 2001, the Commission issued five separate but interrelated orders addressing the establishment of an RTO in the Midwest region. In Docket No. RT01-87-000, *et al.*, the Commission approved the Midwest ISO as an RTO (hereinafter "December 20 MISO Order"); in Docket No. ER01-3000-000 *et al.*, the Commission approved International Transmission Company's request to transfer operational control of its transmission facilities to the Midwest ISO (hereinafter "December 20 International Transmission Company Order"); in Docket No. EC01-137-000, the Commission preliminarily approved the disposition of International Transmission Company's transmission facilities to an unaffiliated entity with no ownership interest in order to facilitate a stand-alone transmission company under the Midwest ISO umbrella (hereinafter "December 20 ITC-MISO Order"); in Docket No. RT01-88-000 *et al.*, the Commission concluded that the Alliance Companies lacked sufficient scope to exist alone as a single RTO and further ordered the Alliance Companies to explore how their business plan can be modified within the Midwest ISO (hereinafter "December 20 Alliance Order"); and, finally, in Docket No. EL01-80-001, *et al.*, the Commission granted in part and deferred in part National Grid's request for a declaratory order that it is not a market participant and also dismissed the Alliance Companies' business plan (hereinafter "December 20 National Grid Order").

On September 16, 1998, the Commission entered an order, which approved, on a conditional basis, the formation of the Midwest ISO.² In late 2000, Illinois Power, followed by Ameren Corporation and Commonwealth Edison Company announced their intent to withdraw from the Midwest ISO and join the neighboring Alliance RTO. On May 8, 2001, the Commission entered an order accepting a Settlement Agreement, which allowed Illinois Power, Ameren, and ComEd to withdraw from the Midwest ISO, and in conjunction with the Inter-regional Cooperation Agreement (“IRCA”), provided guidance to facilitate the development of a seamless Midwest market.³ In *Illinois Power*, the Commission expressed its expectation that the Midwest ISO would supplement its January 15, 2001, RTO compliance filing to reflect the effect of subsequent events since the time of its initial compliance filing.⁴

Pursuant to the Commission’s directive on August 31, 2001, the Midwest ISO filed a report supplementing its January 15, 2001 RTO compliance filing. In its filing, the Midwest ISO contended that by operating within the framework of the Settlement, including the IRCA, the Midwest ISO satisfies the scope and configuration requirements of Order No. 2000. Accordingly, the Midwest ISO requested that the Commission find that the Midwest ISO meets the requirements for RTOs established by the Commission in Orders 2000 and 2000-A.

On October 15, 2001, in compliance with certain directives from the September 16 Order cited above, the Midwest ISO filed its Summary of Operating and Emergency Procedures in Docket Nos. ER02-106-000 and its proposed Market Monitoring Plan in Docket No. ER02-108-000.

²Midwest Independent Transmission System Operator, Inc., et al., 84 FERC ¶ 61,231 (September 16 MISO Order), order on reconsideration, 85 FERC ¶ 61,250, order on reh’g, 85 FERC ¶ 61,372 (1998).

³ *Illinois Power Company, et al.*, 95 FERC ¶ 61,183 (2001), reh’g denied, 95 FERC ¶ 61,026 (2001) (Illinois Power).

⁴ *Id.* at ¶61,647.

Throughout the course of the past year, as the Commission pointed out in its December 20 MISO Order, the Commission “. . . has undertaken an across-the-board assessment of RTO development, the status of numerous ongoing proceedings involving RTO proposals, and the ongoing changes in the electricity marketplace since the issuance of Order No. 2000.⁵ In addition, the Commission has taken several additional informational-gathering procedural steps designed to help it obtain additional information that might assist it with the creation and development of RTOs. To illustrate, and of particular relevance to the ICC, was a November 9, 2001 letter sent by the Commission to all Midwest state utility commissioners specifically inquiring about RTO development in the Midwest to that point in time. The Commission also held an “on-the-record” state-federal RTO panel discussion on RTO issues with Midwest state utility commissioners on November 27, 2001.

Subsequently, on December 20, 2001, the Commission issued five interrelated orders designed to move the process forward in establishing the optimally sized RTO in the Midwest. In its December 20 MISO Order, the Commission found that the Midwest ISO’s RTO proposal satisfied the criteria required under Order No. 2000 for RTO status. More importantly, the Commission explained that “. . .the Midwest ISO’s proposal most fully complies with the vision and requirements of Order No. 2000, in particular the requirement that an RTO be of sufficient scope, and that the Midwest ISO therefore should serve as the foundation upon which a Midwest RTO should be built.”⁶ In contrast to the foregoing, the Commission, in its concurrently issued December 20th Alliance Order, concluded that the Alliance Companies (which had previously filed for approval as a separate RTO) lacked sufficient scope to exist as a stand-alone RTO. The Midwest ISO and the Alliance RTO have, over the last couple of years, competed for

⁵ December 20 Midwest ISO Order at 5.

prominence in the Midwest region to serve as the organization in charge of establishing common rules governing how utilities will trade bulk electricity across the transmission systems within the Midwest region. The Commission concluded that “. . . allowing two RTOs in the Midwest would be a second-best solution that would not serve the best interests of customers throughout the Midwest.”⁷ Consequently, the Commission concluded that “. . . the public interest would best be served if Alliance were to join the Midwest ISO.”⁸ The Commission, therefore, directed the Alliance Companies to explore how their business plan can be accommodated within the Midwest ISO. In yet an additional order in Docket No. EL01-80-000 *et. al.*, the Commission also rejected the Alliance Companies’ business plan that had previously been filed for approval with the Commission.

II. SPECIFICATION OF ERROR

The Commission erred in finding that the Midwest ISO satisfies Order 2000’s requirements for: (1) independence; (2) configuration; and (3) market monitoring.

III. ARGUMENT

The ICC respectfully submits that the Commission erred in its decision to grant RTO status to the Midwest ISO. Rather, the ICC believes that the Midwest ISO, in its current form, fails to satisfy the Order No. 2000 criteria for independence, configuration, and market monitoring. For this reason, the ICC renews its request that the Commission adopt the recommendations the ICC outlined in its September 21 Comments on the Midwest ISO’s

⁶ December 20 Midwest ISO Order at 2.

⁷ December 20 Alliance Order at 14.

⁸ *Id.* at 14.

supplemental Order 2000 compliance filing in Docket. No. RT01-87-001 and of the Joint State Commissions' Request for Rehearing of the Commission's July 12, 2001 Alliance Order in Docket No. RT01-88-001.⁹ In both those pleadings, the ICC and other Midwest state commissions recommended that the Commission address, in detail, the merits of both the Midwest ISO proposal and the Alliance RTO proposal and direct a public mediation procedure in which the most beneficial features of each proposal could be identified and adopted to form a single RTO for the Midwest.¹⁰ Finally, the ICC urges the Commission to reverse its approval of the Midwest ISO market monitoring plan and establish procedures so that the flaws previously identified by the ICC in that plan can be addressed and corrected.

A. THE COMMISSION SHOULD REHEAR ITS DECISION TO
APPROVE THE MIDWEST ISO'S COMPLIANCE WITH THE
INDEPENDENCE STANDARD OF ORDER 2000

In Order No. 2000, the Commission established independence as one of the four characteristics required of an RTO, reaffirming its prior statements that “[a]n RTO needs to be independent in both reality and perception.”¹¹ In particular, the Commission required that the RTO “have a decision making process that is independent of control by any market participant or class of participants.”¹² The Commission reaffirmed its view that “this principle should apply to all RTOs, whether they are ISOs, transcos or variants of the two.”¹³

In Order 2000, the Commission explained that the overall purpose of the independence characteristic is to “ensure that an RTO will provide transmission service and operate the grid in a non-discriminatory manner.” The Commission further explained that equal access hinged on

⁹ See (<http://cips.ferc.gov/Q/CIPS/ELECTRIC/RT/RT01-88.00I.TXT>).

¹⁰ Midwest Commission's Joint Request for Rehearing, at 3.

¹¹ Order 2000, FERC Stats & Regs ¶ 31,089 at 31,065 (1999).

¹² Order 2000 at 31,061.

¹³ Order 2000 at 31, 061.

the RTO's independence from market participants whose economic or commercial interests are likely to be affected by an RTO's decisions.¹⁴ For these reasons, the Commission established that any RTO "must have a decision making process that is independent of control by any market participant or class of participants."¹⁵

Unfortunately, in determining that the Midwest ISO met the independence requirements of Order No. 2000, the Commission found dispositive the fact that the Midwest ISO "... is self-financing and thus not owned by any market participant and Midwest ISO's Board was structured to be independent of control by any market participant."¹⁶

The ICC disputes the validity of a standard which concludes that the fact that the Midwest ISO is not owned by any market participant, *per se*, guarantees Midwest ISO independence. The ICC also takes exception to the Commission's conclusion that the Midwest ISO governance and business structure satisfies Order No. 2000's independence requirement. With regard to the Commission's *per se* standard, the ICC contends that it is not possible for a transmission operator, such as the Midwest ISO, to be truly independent if market participants play a role in the transmission operator's decision-making process or if certain market participants' market interests are likely to be favored over others in the transmission operator's decision-making. In this case, the Midwest ISO intends to exercise functional control over the transmission facilities of its transmission-owning member utilities that will retain both generation and power marketing interests.¹⁷ Under these circumstances, it is unreasonable to

¹⁴ Order 2000, FERC Stats & Regs ¶ 31,089 at 31,061 (1999).

¹⁵ *Id.*

¹⁶ December 20 Midwest ISO Order at 11.

¹⁷ The ICC is not, herein, making an argument concerning the shortcomings of mere functional control, rather than full operational control, by the Midwest ISO over the transmission system. To the extent that functional control is inadequate, the transmission owners will be able to directly favor their own market interests through the way they implement transmission operating instructions passed down to them from the Midwest ISO. If functional control is inadequate, then the Midwest ISO's transmission system operations would not be independent of the transmission-

expect the Midwest ISO to be able to ignore the market interests of its transmission-owning members when making transmission operating and planning decisions. While it is true that Midwest ISO membership is open to any transmission user or transmission owner willing to pay the membership charge, transmission-owning members of the Midwest ISO hold a special status because, without them, the Midwest ISO could not exist.¹⁸ Similarly, participation in the Midwest ISO by particular transmission owners may be necessary for the Midwest ISO to achieve and sustain other Order 2000 required RTO characteristics (such as configuration).

Consequently, as long as transmission ownership and transmission operation are separated, and the transmission owners retain market interests while the Midwest ISO controls transmission operations, the Midwest ISO will not be able to ignore the market interests of its transmission-owning members. Instead, the Midwest ISO will have the incentive to favor the market interests of its transmission owner members over the market interests of non-transmission owners (to maintain its own existence and to maintain and expand its range). Furthermore, the Midwest ISO will possess the available means, through transmission system planning and operations, to favor transmission-owning members' market interests over the market interests of non-transmission owners.

The degree of influence exercised by transmission-owning members on Midwest ISO actions can be illustrated from recent history of RTO development in the Midwest. The

owners' market participant interests. However, the ICC is not challenging, herein, the Commission's conclusions about the adequacy of Midwest ISO functional control. Rather, the ICC is challenging the Midwest ISO governance and business design more directly. The ICC's arguments concerning the Midwest ISO's lack of independence from transmission-owners' market interests remain valid regardless of the degree of transmission operational authority vested in the Midwest ISO, provided that transmission facility ownership remains with entities having power marketing and power generating interests.

¹⁸ The Midwest ISO Agreement defines "member" as, "A person or business entity which is (i) an Eligible Customer, as defined in the Transmission Tariff, or (ii) an Owner, as defined herein, and which pays to the Midwest ISO, the non-refundable membership fees as required herein. Such person or entity shall be a Member during the period covered by the applicable membership fees unless earlier terminated pursuant to this Agreement."

Commission by now is all too familiar with how transmission owner threats to withdraw and decisions to withdraw from a regional transmission operator can drastically alter the behavior of a transmission operator such as the Midwest ISO. For example, the Midwest ISO's response to the threats to depart, and subsequent departure, by the Illinois companies (ComEd, IP, and Ameren) from the Midwest ISO clearly illustrates the dependence of a transmission operator, such as the Midwest ISO, on the actions of its transmission-owning members. Indeed, in its January 16, 2001 supplemental Order 2000 compliance filing, the Midwest ISO went so far as to offer to change its non-stock, not-for-profit organizational structure and to make other dramatic changes to the Midwest ISO Agreement to induce a return to the Midwest ISO by the three Illinois Companies.¹⁹ The ICC submits that no RTO can be truly independent if its existence and operations can be so easily threatened, altered, and manipulated by a market participant or class of market participants. The Midwest ISO governance design is not a prescription for RTO independence and falls far short of the independence standard contemplated under Order 2000.

In light of the foregoing, the Commission's December 20 MISO Order conclusion that the Midwest ISO has "a decision making process that is independent of control by any market participant or class of participants" is in error and should be reversed. Under the Midwest ISO business and governance structure, the class of transmission-owning Midwest ISO members that are market participants will always exercise greater influence over the Midwest ISO decision-making process than will any other member with market interests. Similarly, any transmission-owning member that is strategically situated such that its participation in the Midwest ISO would

¹⁹ Midwest ISO's January 15, 2001 Compliance Filing (Executive Summary) at 5.

enable the Midwest ISO to satisfy other Order 2000 requirements will also exercise greater influence over the Midwest ISO decision-making process.

As a practical matter, in order to achieve genuine RTO independence, it may be necessary for the Commission to require the separation of both transmission ownership and operation from power generating and marketing interests (or at least to establish conditions that would create momentum in that direction). Indeed, in the International Transmission Company decision, also issued on December 20, 2001, the Commission emphasized the importance of genuine independence as follows:

Within this context, the proposed divestiture of International Transmission as a separate transmission business to an unaffiliated entity with no ownership interest in a market participant is a laudable and significant step This type of divestiture (i.e., the transfer of control over assets to an unaffiliated third party non-market participant) is one of the most effective means of separating transmission interests from market or generation interests, and achieving independence for an appropriately-formed for-profit transmission company.²⁰

In sum, the Midwest ISO business and governance design fails to achieve the necessary independence from market participant interests and does not contain provisions to create momentum toward the divestiture necessary to accomplish genuine independence. The Commission's finding that the Midwest ISO satisfies the independence standard of Order 2000 should be reversed and specific guidelines should be given to the Midwest ISO and the Midwest ISO transmission owners concerning the necessary changes to the Midwest ISO business and governance design on a going-forward basis.

²⁰ December 20 International Transmission Company Order at 3.

B. THE COMMISSION SHOULD REHEAR ITS DECISION TO APPROVE THE MIDWEST ISO'S COMPLIANCE WITH THE CONFIGURATION STANDARD OF ORDER 2000.

Order 2000 established the policy that an RTO must serve a region of appropriate scope and configuration.²¹ While Order 2000 did not specifically define regions across the country, it recognized that the purpose of an RTO is to support regional power markets in terms of reliability, operations and wholesale trading; and the scope and configuration of an RTO should be designed toward that purpose.²² In sum, an RTO should be of “sufficient scope and configuration to permit the [RTO] to maintain reliability, effectively perform its required functions, and support efficient and non-discriminatory power markets.”²³ In Order 2000, the Commission specifically concluded as follows: “To satisfy the scope and configuration characteristic of this final rule, all or most of the transmission facilities in a region must be included in the RTO. Any RTO proposal filed with us should intend to operate all transmission facilities within its proposed region.”²⁴

In the December 20 Order, the Commission found that “the Midwest ISO has adequate scope and configuration to meet the requirements of Order 2000.”²⁵ This finding is in error in that the ICC believes that the Commission failed to establish any workable provisions specifically designed to address the need for coordination between the Midwest ISO and the Alliance Companies.

²¹ Order 2000 at 31,079.

²² *Id.*

²³ Order 2000 at 31,083.

²⁴ Order 2000 at 31,086.

²⁵ December 20 Midwest ISO Order at 15.

In its August 31 filing in Docket RT01-87-001, the Midwest ISO candidly acknowledged that its ability to comply with Order 2000's configuration requirements depended on the provisions of the IRCA that were adopted as part of the Settlement Agreement. To illustrate, the Midwest ISO asserted as follows:

The eastern border of the Midwest ISO consists of an intertwined set of seams that are the direct result of the departure of ComEd, Ameren and Illinois Power to the Alliance RTO. The effects of these eastern seams can be adequately mitigated through the timely and effective implementation of the inter-RTO Cooperation Agreement ("IRCA") as required under the terms of the Settlement between the Midwest ISO and the Alliance RTO.²⁶

and,

The primary provision of the Settlement Agreement availing the Midwest ISO the opportunity to become a fully compliant RTO are found within specific articles in the Inter-RTO Cooperation Agreement ("IRCA")²⁷

and,

The effectiveness of the Midwest ISO's configuration depends on timely and effective implementation of the IRCA.²⁸

Similarly, the ICC, in its September 21, 2001 Comments on the Midwest ISO's August 31 filing, noted that unless satisfactory coordination between the Alliance Companies and the Midwest ISO is implemented, the Midwest ISO would not be able to satisfy the configuration requirements of Order 2000. Specifically, the ICC stated,

²⁶ Midwest ISO Aug. 31 Filing at 2.

²⁷ *Id.* at 3-4.

²⁸ *Id.* at 4.

Unfortunately, as explained in greater detail, *infra*, the execution of the Settlement Agreement is not occurring in full and complete accordance with its terms or the expectations of the parties involved in the Settlement. The basis for approving the Midwest ISO's scope and configuration, as a result, is not fulfilled. The ICC respectfully requests that the Commission not approve the Midwest ISO's scope and configuration.²⁹

The ICC went on to explain that,

The problems in implementing an interregional cooperation approach to achieving adequate RTO scope and configuration in the Midwest have prevented the Midwest ISO, in addition to the Alliance RTO, from satisfying the Order 2000 scope and configuration requirement.³⁰

The ICC argued that the incomplete implementation of IRCA prevented both the Midwest ISO and the Alliance RTO from separately satisfying the scope and configuration requirements of Order 2000.³¹ The ICC also observed that the design of the IRCA was not ideally suited to obtaining an outcome functionally equivalent to having a single RTO in the Midwest.³²

In its Alliance Order, also issued on December 20, the Commission briefly touches on the importance of the IRCA as a means to address the seams problem between the Midwest ISO and the proposed Alliance RTO.³³ Indeed, in contrast with its Midwest ISO configuration conclusion, the Commission explicitly stated that proper Alliance RTO scope and configuration could only be met upon a showing of proper coordination with the Midwest ISO.³⁴

²⁹ ICC's September 21, 2001 Comments in Docket R01-87-001 at 5.

³⁰ *Id.* at 7.

³¹ *Id.* at 8.

³² For example, in its Comments on the Settlement, the Midwest State Commissions identified the following flaws in the Settlement's design: (1) generators outside the Midwest ISO/ARTO super-region will continue to pay pancaked rates to cross one of the two RTOs and access load in the other; (2) there is no certainty that any of the interregional cooperation elements of the Settlement, including the super-regional rate, will remain in place after December 31, 2004; and (3) the existence of two RTOs in the Midwest region will impose unnecessary cost duplication.

³³ December 20 Alliance Order at 13.

³⁴ Specifically, the Commission stated, "Our earlier finding regarding the adequacy of the scope of the Alliance RTO relied, in part, on implementation of the IRCA, which was intended to provide the basis for a seamless market in the territories served by the Midwest ISO and the Alliance RTO." December 20 Alliance Order at 11-12.

In the Alliance Order, the Commission found fault with both the implementation and the underlying design of the IRCA. With respect to shortcomings in IRCA implementation, the Commission stated, “Our earlier orders expected the IRCA discussions to provide the necessary coordination and agreement, but this expectation has yet to materialize in a concrete plan.”³⁵ With respect to shortcomings in IRCA design, the Commission stated, “While a more effective IRCA could have provided that necessary close coordination, and so have ‘adequately eliminated’ the effects of seams between the proposed Alliance RTO and the Midwest ISO, [footnote omitted] the IRCA **as currently drafted** does not.”³⁶

The ICC interprets these two quoted Commission statements and the various Commission actions taken in the five concurrently released December 20 Orders as having rendered the IRCA moot, as a practical matter, at this point in time. The ICC supports the Commission’s reversal of IRCA because the IRCA has proved to be flawed both in implementation and design.

The Commission’s clear dissatisfaction with the efficacy of the IRCA, however, the Commission’s December 20 Order approving the Midwest ISO’s scope and configuration ignores the necessity to have in place workable mechanisms for coordination between the Midwest ISO and the Alliance Companies before the Midwest ISO can receive approval to operate as an RTO. The denial of RTO status to the Alliance RTO does not eliminate the need to have in place some provision to address the seam between the Midwest ISO and the Alliance Companies. Nevertheless, the Commission’s December 20 MISO Order merely states as follows:

In the interim, Midwest ISO is directed to explore ways to address the less than ideal situation that will exist prior to the integration of the Alliance Companies

³⁵ December 20 Alliance Order at 13.

³⁶ December 20 Alliance Order at 13 (emphasis added).

into Midwest ISO and to present recommendations to the Commission for consideration within 60 days.³⁷

The Commission's simultaneous December 20 Alliance Order in Docket RT01-88-000 et al acknowledges that the Commission was persuaded by the majority of Midwest state commissions concerning the importance of having a single RTO in the Midwest region. The Commission's Alliance Order denies RTO status to the Alliance RTO and directs the Alliance Companies to "explore how their business plan . . . can be accommodated within the Midwest ISO."³⁸ This directive, even in conjunction with the corresponding directive given by the Commission to the Midwest ISO (quoted above) will not necessarily lead to the development of a single RTO in the Midwest and does nothing to resolve the seams problem between the Midwest ISO and the Alliance Companies.

Both the Commission's December 20th Midwest ISO Order and Alliance Order fail to address the coordination objectives of IRCA in detail and neither Order explains how proper coordination will be put in place between the Midwest ISO and the Alliance Companies. Rather, the Commission's Orders seem to merely express a hope that these coordination issues will be resolved by participation in some manner by the Alliance Companies in the Midwest ISO.

The ICC, therefore, contends that the Commission erred in approving the Midwest ISO as an RTO absent specific guidelines and direction from the Commission regarding coordination between the Midwest ISO and the Alliance Companies. While the ICC appreciates the Commission's acknowledgment of IRCA's shortcomings, in both design and implementation, IRCA, at least, represented an attempt to address the issue of coordination between the Midwest ISO and the Alliance Companies. In contrast, the Commission's December 20 Orders have, in

³⁷ *Id.* at 15.

³⁸ December 20 Alliance Order at 4.

essence, completely eliminated the IRCA from the equation and, instead, have replaced it with the mere hope that the Alliance Companies will voluntarily decide to join the Midwest ISO in a way that satisfactorily addresses the need for coordination between the Alliance Companies and the Midwest ISO.

This failure to specifically address and resolve the issue of necessary coordination between the Midwest ISO and the Alliance Companies, particularly the Illinois members of the Alliance (ComEd, IP, and Ameren), makes proper Midwest ISO operation as an RTO impossible, a conclusion clearly highlighted by the Midwest ISO in their August 31 supplemental Order 2000 compliance filing. The IRCA and the Settlement Agreement were intended to address this necessary coordination issue. After all, IRCA was initially approved by the Commission as the condition permitting the Illinois companies to withdraw from the Midwest ISO.³⁹

Currently, several members of the Midwest ISO are islands surrounded by Alliance Companies: specifically, Central Illinois Light Company, Southern Illinois Power Cooperative and the International Transmission Company. Similarly, the eastern wing of the Midwest ISO is not connected with its western wing. This current non-contiguous configuration makes it difficult, if not impossible, to achieve the operational and competitive benefits of an RTO without coordination with the non-Midwest ISO companies. The Midwest ISO itself acknowledged this problem in its Order 2000 compliance filing where it stated:

However, the Midwest ISO warned that the departure of Illinois Power, ComEd, and especially Ameren would create a large hole in the middle of the Midwest ISO leaving it with a technically unworkable scope and configuration.⁴⁰

³⁹ See Illinois Power Company, 95 FERC ¶ 61,183 (2001), reh'g denied, 95 FERC ¶ 61,026 (2001).

⁴⁰ Midwest ISO Compliance Filing (August 31, 2001) at 23.

In addition to violating the “one contiguous area” principle, the Midwest ISO’s current configuration falls short of adequately satisfying several other factors that the Commission has determined to be critical when evaluating the appropriate and optimal configuration of an RTO. Specifically, the current Midwest ISO configuration does not encompass a highly interconnected portion of the grid, recognize trading patterns or take into account existing regional boundaries. The Midwest ISO acknowledged that the departure of the Illinois utilities would have a negative impact on its ability to operate:

Ameren’s transmission system was vital to its RTO operations because of its high degree of physical interconnection with other Midwest ISO Transmission Owners, including its direct ties to both Illinois Power and ComEd. Ameren provided the bridge between the Midwest ISO Transmission Owners located in MAPP and northern MAIN, such as Alliant Energy, Xcel Energy (formerly Northern States Power) and ATC, LLC, with the transmission systems in ECAR owned by Cinergy Corp., LG&E Energy, and Southern Indiana Gas & Electric Company.⁴¹

Once again, in an attempt to remedy this problem, the MISO and the Alliance Companies negotiated the IRCA. Without effective coordination between the Midwest ISO and the Alliance Companies, and, more importantly, absent a mechanism to replace the IRCA, the Midwest ISO will be unable to overcome the operating difficulties caused by the earlier departure of the Illinois utilities.

The ICC reiterates, however, that the Commission’s December 20 Orders, fail to put in place a specifically designed mechanism which would effectively replace the IRCA and, thus, sufficiently address the seams issue that was created by the Illinois companies’ withdrawal from the Midwest ISO. While the Commission’s Alliance Order does require the Alliance Companies to file “a statement of their plans to join an RTO,” by February 18, 2002, the ICC has serious concerns and doubts that the necessary coordination required between the Alliance Companies

and the Midwest ISO will materialize in order for the Midwest ISO to operate as an RTO during the sixty day period. Similarly, there is no guarantee that the sixty-day discussion period and reporting requirement will develop any mechanism to replace IRCA. In short, effective Midwest RTO operation is severely threatened despite the sixty-day negotiation period imposed by the Commission.

The ICC's concern is further heightened in light of the Commission's apparent support for the Midwest ISO's Appendix I⁴² as an appropriate vehicle for participation in the Midwest ISO by the Alliance Companies. According to the Commission:

We direct Alliance Companies to explore how their business plan (including National Grid) can be accommodated within the Midwest ISO, e.g., via Appendix I; in doing so, we are mindful of the benefits that for-profit transcos can provide.⁴³

The Commission further states: "we are confident that it [the Alliance Transco] can be a successful Transco under the Midwest ISO's Appendix I."⁴⁴ The Commission's endorsement of Appendix I as an appropriate vehicle for Alliance participation in the Midwest ISO is particularly troubling to the ICC in light of the previous positions taken by the ICC and the other various Midwest state commissions' responses to the Commission's RTO structure questions of November 9. The joint Midwest state commissions stated, "The Midwest State Commissions have a number of serious reservations about Appendix I."⁴⁵ The joint state commissions went on to list and explain these "serious reservations." Similarly, ICC Commissioners Harvill and Squires stated at page 8 of their response to the Commission's RTO structure questions, "we are

⁴¹ Midwest ISO Compliance Filing (August 31, 2001) at 23.

⁴² Appendix I creates a framework for membership and operation of independent transmission companies within the Midwest ISO. See *Commonwealth Edison Company, et al.*, 90 FERC ¶ 61,192 (2000).

⁴³ December 20 Alliance Order at 14.

⁴⁴ *Id.*

⁴⁵ Joint State Commission Response to FERC's RTO Structure Questions at 10 (November 30, 2001).

highly skeptical of the model set forth in the Midwest ISO's Appendix I." Finally, ICC Commissioners Kretschmer and Hurley concurred with this by stating at page 3 of their response to the Commission's RTO structure questions, "If FERC insists on a hybrid RTO for the Midwest, Appendix I is not the best model because it jeopardizes the business viability of the Transco."

Nevertheless, the Commission, in its December 20 Midwest and Alliance Orders, completely dismissed the Midwest state commissions' consensus opinion regarding Appendix I and its accompanying flaws. As a result, the ICC remains concerned that using Appendix I as the vehicle for addressing the need for coordination between the Alliance Companies and the Midwest ISO may well result in a coordination outcome as inferior, if not more so, as the outcome previously produced by IRCA.

With the foregoing in mind, the ICC urges the Commission to rescind its grant of RTO status to the Midwest ISO and reverse its finding that the Midwest ISO satisfies the Order 2000 scope and configuration requirement until proper means of coordination between the Alliance Companies and the Midwest ISO can be implemented. Consistent with the ICC's recommendations in its September 21 Comments on the Midwest ISO's supplemental Order 2000 compliance filing in Docket No. RT01-87-001 and the joint state Commissions' request for rehearing of the Commission's July 12, 2001 Alliance Order (among other places),⁴⁶ the ICC recommends that the Commission address, in detail, the merits of both the Midwest ISO

⁴⁶ See, Request for Rehearing of the Illinois Commerce Commission, the Michigan Public Service Commission, the Indiana Utility Regulatory Commission, the Pennsylvania Public Utility Commission and the Public Utilities Commission of Ohio, *Alliance Companies, et al.*, Docket Nos. RT01-88-000, *et al.* (filed Aug. 13, 2001) ("Midwest State Commissions' RFR of the July 12 Alliance Order").

proposal and the Alliance RTO proposal and direct a public mediation procedure in which the best features of each proposal could be adopted to form a single RTO for the Midwest.⁴⁷

C. THE COMMISSION SHOULD REHEAR ITS DECISION TO APPROVE THE MIDWEST ISO'S MARKET MONITORING PLAN AS BEING IN COMPLIANCE WITH ORDER 2000.

In Order 2000, the Commission determined that an RTO's market monitoring plan must be designed to ensure that there is objective information about the markets that the RTO operates or administers and a vehicle to propose appropriate action regarding any opportunities for efficiency improvement, market design flaws, or market power identified by that information.⁴⁸ In addition, the Commission required that an RTO's market monitoring plan should enable the market monitor to: (1) identify the markets that will be monitored; (2) examine the structure of the market; (3) ensure compliance with market rules; (4) monitor behavior of both individual market participants and the market as a whole; and, finally (5) address market power and market power abuses.⁴⁹

In an apparent attempt to meet the Commission's Order 2000 requirements, the Midwest ISO tendered for filing in Docket ER02-108-000 its proposed Market Monitoring Plan. Having examined the Midwest ISO's plan, the Commission, in its December 20th MISO Order found that the Midwest ISO's Plan "... generally satisfies the Order No. 2000 requirements" for objective and independent market monitoring.⁵⁰ In this conclusion, the Commission errs. As amply

⁴⁷ At page 13 of the December 20 Alliance Order, the Commission declined to address the issues of Alliance RTO "independence, planning protocol, congestion management, stakeholder process, and other procedural issues" stating only that "the public interest would be best served if Alliance were to join the Midwest ISO."

⁴⁸ Order 2000, FERC Stats & Regs ¶ 31,089 at 31,156 (1999).

⁴⁹ Id.

⁵⁰ December 20 Midwest ISO Order at 34.

demonstrated in the ICC's Comments in Docket ER02-108-000 there are numerous flaws in the Midwest ISO's market monitoring plan. In particular, the market monitor cannot be expected to impartially monitor the RTO and to act independently of the RTO if the market monitor remains a contract agent of the RTO. Accordingly, the Commission should ensure market monitor independence by, for example, having the market monitor be a contract agent of the Commission, rather than of the RTO. Moreover, the plan has an inadequate description of "market power," lacks market power mitigation procedures, has inadequate and improper provisions for access by State commissions to market monitor data and information, and contains numerous internal contradictions and inconsistencies.

None of the ICC's specific or general concerns regarding the market monitoring plan were addressed in the Commission's December 20 Midwest ISO Order, nor were any of the ICC's recommendations adopted. More importantly, no developments have materialized in the interim that might allow the ICC to reconsider its position on the Midwest ISO's market monitoring plan. Thus, it is clear the Commission erred in concluding that the Midwest ISO's proposed market monitoring plan "generally satisfies the Order 2000 requirements."⁵¹

1. Independence of the Market Monitor from the RTO

With regard to market monitor independence from the RTO, the Commission's December 20 Order requires that the Midwest ISO "submit for review its contract with Potomac Economics."⁵² The Commission stated, "Without knowing the details of the contract we cannot

⁵¹ December 20 Midwest ISO Order at 34.

⁵² Id.

be sure that the IMM [independent market monitor] is truly independent of the RTO.”⁵³ The ICC agrees with the Commission that the market monitor must be “truly independent” of the RTO. The ICC, however, fails to see how the Commission can ascertain that the market monitor is independent of the RTO merely by reviewing the contract between the market monitor and the RTO. Rather, the contractual relationship between the market monitor and the Midwest ISO, in and of itself, signifies the absence of independence between the market monitor and the Midwest ISO. The ICC explained this problematic relationship in detail at pages 4-14 of its November 19 Comments in Dkt. No ER02-108 and will not repeat that detailed explanation here.

The ICC renews its conviction that the market monitor cannot be independent of the Midwest ISO if the market monitor is a contract agent of the Midwest ISO. Therefore, the Commission erred in approving the Midwest ISO’s market monitoring plan and in adopting inadequate procedures for judging market monitor independence from the Midwest ISO.

2. Market Power and Market Power Mitigation Measures

With regard to market power and market power mitigation measures, the ICC’s Comments in Dkt. No. ER02-108 indicated that the Midwest ISO’s market monitoring plan lacks a usable definition and description of market power and pointed out that the market monitoring plan fails to provide the market monitor with any true market mitigation authority.⁵⁴ In contrast, the Commission’s December 20 Midwest ISO Order found that the Midwest ISO’s plan to have the market monitor “make recommendations for corrective action,” rather than exercising limited

⁵³ December 20 Midwest ISO Order at 34.

⁵⁴ ICC’s November 19 Comments at 15-18.

market mitigation authority, as the ICC recommended, is “completely consistent with Order No. 2000.”⁵⁵

The ICC disagrees, as pointed out in its Comments on the Midwest ISO’s market monitor filing (at 18), and believes that working markets would be promoted and market failure crises minimized if the market monitor possesses real time and short-term market power mitigation authority. The Commission erred in approving the Midwest ISO’s market monitoring plan that lacks market power mitigation procedures and the matter should, therefore, be reheard.

As a final matter, the ICC seeks clarification as to whether the existence of the Midwest ISO market monitoring plan will exempt public utilities making wholesale sales into the Midwest ISO from application of the Commission’s recently adopted Supply Margin Assessment (“SMA”) screen. In particular, in its November 20, 2001 AEP Marketing et al Order, the Commission determined as follows:

All sales, including bilateral sales, into an ISO or RTO with Commission-approved market monitoring and mitigation will be exempt from the SMA and, instead, will be governed by the specific thresholds and mitigation provisions approved for the particular markets.⁵⁶

The Commission approved the Midwest ISO market monitoring plan even though it contains no provisions for “penalties and sanctions.”⁵⁷ The ICC interprets the Commission’s use of the terms “penalties and sanctions” in the December 20 Midwest ISO Order to be equivalent to the term “mitigation provisions” as used in the November 20 AEP Marketing Order. Accordingly, the ICC seeks clarification as to whether or not the Commission intends to shield sellers into the Midwest ISO market from application of the SMA screen on the singular basis of

⁵⁵ December 20 Midwest ISO Order at 35.

⁵⁶ November 20, 2001 AEP Marketing et al Order at 8 (emphasis added).

⁵⁷ December 20 Midwest ISO Order at 35.

the approval of the Midwest ISO's market monitoring plan. In this regard, the ICC suggests the appropriate response to its inquiry is that sales into the Midwest ISO not be shielded from application of the SMA screen until the Midwest ISO has in place an effective market-monitoring program with limited market monitor authority to mitigate exercises of market power.

3. State Commission Access to Market Monitor Data and Information

With regard to market monitor data and information, the ICC's November 19 Comments on the Midwest ISO market monitoring proposal described how the provisions of the Midwest ISO's market monitoring plan combine to thwart state commission access to needed data and information. The ICC specifically identified the necessary changes to the market-monitoring plan at pages 26-34 of its Comments and generally described the importance of such data and information to state commissions at pages 20-21 of its Comments. The ICC renews its call for unrestricted state commission access to all data and information that the market monitor gathers from the RTO. It is vital for the state commissions to have access to all data and information that the market monitor gathers from market participants, provided, of course, that an appropriate protective agreement is in place. State commission access to data and information that the market monitor gathers from the RTO should not be thwarted by the RTO's so-called "information policy" as currently provided by Section 6.3 of the Midwest ISO market monitoring plan. Similarly, state commission access to data and information that the market monitor gathers from the Midwest ISO market participants should not be blocked by the

requirement of obtaining “prior written consent” from the market participant as currently required by Section 6.3 of the market monitoring plan.

The Commission’s endorsement of Midwest ISO market monitoring plan provisions that block state commission access to market monitor data and information was in error. The ICC, therefore, requests that the Commission rescind its approval of the Midwest ISO market monitoring plan and establish procedures so that the flaws in the plan can be eliminated.

CONCLUSION

WHEREFORE, for each and all of the foregoing reasons, the Illinois Commerce Commission respectfully requests that the Commission rehear its December 20, 2001 Order and find that the Midwest ISO does not yet satisfy the Commission’s Order 2000 RTO standards for independence, configuration, and market monitoring. The ICC also seeks clarification concerning the application of the Commission’s SMA screen to entities selling into Midwest ISO power markets.

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Respectfully submitted,

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